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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, ex rel. ED W. HANCOCK, ATTORNEY GENERAL,

Petitioner,

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

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Interest of *Amicus*

New York, as other states, has prepared a Clean Air Implementation Plan and passed new legislation in an effort to improve the quality of the air breathed by its citizens. New York Environmental Conservation Law, Article 19. It needs no underscoring at this late date to emphasize that air pollution has become a national problem of serious dimensions and a recognized health hazard. Congress itself has vigorously responded to this problem through enactment of the Clean Air Act, 42 U.S.C. §§ 1857-

1857l, which creates the federal machinery to insure that each state's Clean Air Implementation Plan meets vigorous standards, but expressly leaves the major enforcement responsibility in the hands of the states. See § 110, 42 U.S.C. § 1857c-5.

Central to New York's plan to control air pollution is its Air Pollution Control Rule 201 (6 NYCRR Part 201), 40 CFR § 52.1675 which requires that new and existing sources of air pollution obtain permits for construction and operation. The regulation is similar to Kentucky Administrative Regulation No. AP-1, § 5, involved in this case. Were these rules to be held inapplicable to federal installations, air quality could not be guaranteed in those states.

Emissions from federal installations are significant sources of air pollution in all parts of the Nation. New York, for example, has Army, Navy and Air Force installations as well as numerous other federal buildings located within its borders. Control of emissions from these sources is essential to clean air in New York. As former President Nixon stated in his 1970 message to Congress on the Environment (Cong. Rec., Vol. 116, Part 24, p. 32911 [Sept. 21, 1970]):

> "For years, many federal facilities have themselves been among the worst polluters."

New York's vital interest in insuring the protection and enhancement of its air quality prompts our deep concern with the outcome of this litigation. Should the courts conclude that federal installations are immune from the states' permit programs under the Clean Air Act a severe blow will have been dealt the effectiveness of that important statute—our citizens' first line of defense against contamination of our air.

New York has already participated as *amicus curiae* in *Alabama* v. *Seeber,* 502 F.2d 1238 (5th Cir. 1974), which

presented identical issues and in which the court held that § 118 of the Clean Air Act, 42 U.S.C. § 1857f, requires Federal sources of air pollution to comply with State air quality control permit procedures.

Summary of Argument

I. The Clean Air Act Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, established a new program of federal-state cooperation for the control of air pollution. The federal government in § 109 (42 U.S.C. § 1857 c-4) sets overall air quality standards and charges the states with primary responsibility for their enforcement. Section 110 (42 U.S.C. § 1857 c-5). In § 118 (42 U.S.C. § 1857f) federal facilities are made subject to state and local air quality requirements "to the same extent as any person is subject to such requirements." Included among these requirements is the central regulatory scheme adopted by all states, the permit system. The legislative history of the Act makes it clear that Congress intended the states to regulate federal facilities with respect to air quality and the overall scheme of the Act demonstrates this as well. Section 116 (42 U.S.C. § 1857 d-1) uses the term "requirements respecting control and abatement of air pollution" just as § 118 does, to mean the entire control strategy of a state. Congress exempted certain federal facilities from state regulation in §§ 111, 112 and 114 (42 U.S.C. § 1857 c-6, c-7 and c-9). Had it intended to create other exemptions, it could have easily so specified.

II. The Supremacy Clause does not bar state regulation of federal facilities with respect to air quality controls. Congress specifically authorized state regulation in § 118 of the Clean Air Act, and this meets the test described in *Mayo.* v. *United States,* 319 U.S. 441, 448, that Congress "affirmatively declare" federal instrumentalities subject to state regulation. Sections 111 and 114 as well as 118 spe-

cifically discuss state regulation of certain federal facilities. Since violation of a state implementation plan is a violation of federal law as well as state law, the Supremacy Clause does not absolve federal facilities from compliance.

III. Likewise, the doctrine of sovereign immunity does not bar suit by a state to require federal facilities to comply with state air quality permit requirements. Congress consented to suit in § 118 when it declared federal agencies subject to state air quality requirements "to the same extent as any person." The court below mistakenly characterized the citizen suit provision in § 304 (42 U.S.C. § 1857 h-2) as the only express waiver of immunity from suit by the federal government in the Act. That provision, however deals only with citizen suits, not suits by a state to enforce its own air quality implementation plan.

Moreover, there is no federal immunity from suits to compel federal agencies to perform ministerial acts mandated by federal law. As § 110 and § 118, read together, require federal agencies to obtain state air quality permits, these agencies are mandated by Congress to obtain a permit and the federal courts have jurisdiction to so direct them.

POINT I

The Federal Clean Air Act does not exempt federal facilities which are sources of air pollution from compliance with federally-approved State permit procedures for control and abatement of air pollution.

The only issue in this case is whether federal facilities which are sources of air pollution are made subject to state air quality permit regulations by § 118 of the 1970 Amendments to the Clean Air Act (42 U.S.C. § 1857f). The court below held that federal facilities are exempt (Appendix p. 157), while the Court of Appeals for the Fifth Circuit, rejecting that view, held them subject to state regulation. *Alabama* v. *Seeber,* 502 F.2d 1238 (5th Cir. 1974). Thus there exists a clear dispute between circuits about the

applicability of § 118 of the Act to pollution caused by federally-operated sources.

This Court has recently interpreted the Clean Air Act Amendments of 1970 in *Train* v. *Natural Resources Defense Council,* —— U.S. ——, 43 USLW 4467, describing in detail the extensive cooperation between the Federal government and the states essential for this "comprehensive planning task of the first magnitude . . . to be accomplished in a relatively short time" (43 USLW 4469). Yet the decision below effectively excludes from regulation all federally-operated sources of air pollution by carrying out an exemption which nowhere appears in the Act. In this legislation, Congress exerted its powers in a comprehensive way to control the emission of harmful substances into the air. Yet the preamble "that the prevention and control of air pollution at its source is the primary responsibility of the states and local governments" remained unchanged from the 1963 Clean Air Act (Pub. Law 88-206, 77 Stat. 392, Title I § 101).

The 1970 amendments departed sharply from the former course of federal involvement in air pollution control. Instead of encouraging states to cooperate in interstate compacts for the control of air pollutants, as in the Air Quality Act of 1967 (Pub. Law 90-148, 81 Stat. 485), Congress devised a master plan to oversee air quality control nationwide. As described in detail in *Train* v. *Natural Resources Defense Council, supra,* the amendments of 1970 gave the U. S. Environmental Protection Agency (EPA) authority to require states "to obtain air quality of specified standards • • • within a specified period of time." 43 USLW 4468. In the alternative, the EPA can enforce these air quality standards itself. Section 113 (42 U.S.C. 1857c-8).

The question before this Court is whether Congress intended federal facilities which are sources of air emissions to be immune from state air quality control permit requirements. The overall design of this unique and complicated

Act and in the legislative history which evolved it demonstrates the clear congressional intent to authorize the states to enforce the Act against all emission sources, whether operated by private interests, municipalities, the states themselves, or federal agencies—a result dictated by public health needs and by simple fairness.

In Section 110 of the amendments (42 U.S.C. § 1857c-5), the basic requirements for the states under the Act and the relationship between them and the federal government are defined. While the federal government sets overall air quality standards for the United States (§ 109, 42 U.S.C. § 1857c-4), the states are responsible for implementation of these goals under criteria set forth in § 110. States are required to prepare plans to meet air quality standards, which must include strategies, laws and regulations to control, monitor and inspect all emission sources as well as land use and transportation strategies if necessary—plans which are then subject to federal accounting as well as periodic review to ensure their adequacy and comprehensiveness. See § 110c (42 U.S.C. § 1857c-5[c]); *Train* v. *N.R.D.C., supra,* 43 USLW 4467, 4468.

A permit program to control stationary sources of air pollution such as Kentucky Administrative Regulation No. AP-1, § 5, 40 C.F.R. § 52.920-.930, has been adopted by every state in the Union. See 40 C.F.R. Part 52. The Act clearly envisages permit systems as a control strategy. In fact, the original draft regulations of the U. S. Environmental Protection Agency required every implementation plan to include a permit system. 36 FR 158, Aug. 14, 1971. Section 110 (a)(2)(B) states that a plan must include:

> "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to ensure attainment and maintenance of such primary and secondary standard . . ."

The task of inventorying emission sources in an air quality control region, gathering information about their processes

and emissions, and then setting emission limitations and compliance schedules for them would have been unfeasible if the burden were not placed upon the sources to come forward with the necessary information for certification. The permit systems of Kentucky and other states are therefore central to the accomplishment of the objectives of the Act. *Alabama* v. *Seeber,* 502 F.2d 1238, 1243.

The federal agencies do not challenge the legitimacy of state permit programs. Instead they seek blanket exception for all federal facilities which are sources of emissions. As part of this contention they allege, and the District Court below agreed (App. 136) "that a permit has absolutely nothing to do with air quality." This proposition is unsupportable, especially since the Administrator has specificially approved permit systems as a control strategy. To argue that Congress has authorized the states to enact plans subject to federal EPA approval to curtail air pollution within their borders but that certain emissions, while harmful, are beyond regulation, recalls George Orwell's dictum that some animals are more equal than others.

Congress was sensitive to the issue of federal-state relationships in drafting this Act. The problem of federally established air quality standards being administered by state officials was recognized by Congress. The Senate Report states,

> "The Committee does not intend to diminish either the authority or responsibility of state and local governments. As is clear in sections 111 [later 110], 113 [later 111] and 114 [later deleted] the states would be expected to have or obtain adequate authority to ensure that the provisions of the Act are enforced." Senate Report, 91-1196 at p. 21.

As to federal facilities which were sources of emissions, Congress expressly found that:

> "Federal agencies have been notoriously laggard in abating pollution and in requesting appropriations to

develop control measures . . ." Senate Report 91-1196 91st Cong., 2d Sess. at p. 37.

Congress explicitly rejected self-enforcement of new emissions limitations by federal facilities as not consonant with protection of the public health. Federally-caused emissions were made subject to the full requirements of the Act in a separate section, § 118 (42 U.S.C. § 1857f), which states:

> "Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having any jurisdiction over any property, a facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution *to the same extent that any person is subject to such requirements.*" (Emphasis supplied)

No clearer pronouncement of Congress' intent could have been devised. As the court stated in *Alabama* v. *Seeber, supra,* this section "conveys a Congressional intent that federal facilities are to be treated equally with private facilities in the scheme of control established by the Act." 502 F.2d at 1243. From the very design of the Act, it was necessary for federal facilities to be subject to state air pollution regulations, including permit regulations, because the states were assigned the duty of implementing the Act in the first instance. This Court should give the statute a construction consistent with its plain and clearly-expressed meaning, *U.S.* v. *Neifert-White Co.,* 390 U.S. 228, 232; *Tcherepnin* v. *Knight,* 389 U.S. 332, 336, particularly where, as here, the Act is a remedial one and one designed to protect the public interest. *U.S.* v. *Champlin Rfg. Co.,* 341 U.S. 290, 298.

The strained construction of § 118 urged by respondents is inconsistent with related portions of the Act. The

phrase "requirements respecting control and abatement of air pollution" used in § 118 is a term of art which is also used in § 116 (42 U.S.C. § 1857d-1), to distinguish from emission limitations. "Requirements respecting control and abatement of air pollution" means all other control strategies for air pollution, such as monitoring, inspection and permits. And § 116 specifically provides that the States are not preempted from utilizing any of these enforcement methods. Read in conjunction with § 118, permitting the states to enforce these "requirements" as against Federal polluters, the Act clearly means that permit procedures are available to the States to regulate Federally-maintained sources of pollution. Federal facilities are elsewhere made subject to suit for violation of "an emission standard or limitation" in § 304(a)(1) of the Act (42 U.S.C. § 1857h-2 [a][1]). The term "requirements" is a broader term and is used in § 118 to encompass state administrative regulation of federal facilities, and therefore permit programs.

In several other sections of the Act, Congress was careful to exempt federal facilities from state control. Section 111 (42 U.S.C. § 1857c-6) deals with the special problem presented by the construction of certain types of new sources which pose significant air pollution problems, such as fossil-fuel power plants, smelters and foundries. These new sources are subject to standards of performance set by the Administrator based upon the latest control technology.* While the Administrator may delegate his powers under § 111 to a state, § 111(c)(1) prohibits such delegation "with all respect to new sources owned or operated by the United States." The design and performance of new federal sources is completely at the discretion of the federal government. In contrast, other federal facilities must meet state requirements. Similarly, in § 114 (42 U.S.C. § 1857c-9), new federal facilities are exempted from state monitoring and inspection if the Administrator has gen-

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* The term "new sources" here describes only those new sources to which a standard of performance applies. 111(a)(2) (42 U.S.C. § 1857c-6[a][2]).

erally delegated those powers to a State; and in § 112 (42 U.S.C. § 1857c-7), the Administrator is prohibited from delegating his authority to control certain especially hazardous emissions not included in ambient air quality standards with respect to all federal facilities. This Court should apply the doctrine of *expressio unius est exclusio alterius. Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 22. As Congress has taken pains to exempt federal sources of emissions from state control in some instances, it must be assumed that if it had intended to exempt federal facilities in all cases, it would have done so. *Alabama* v. *Seeber, supra,* at 1244.

The Court below, in holding federal facilities exempt from state permit requirements, made much of the distinction between "substantive" emission limitations and other administrative air quality procedures such as permits (App. 165), concluding the former were applicable to federal facilities and the latter were not. But the court totally misread § 118, which plainly states that Federally-maintained sources are subject to State "requirements respecting control and abatement of air pollution"—a term which includes permit programs (see § 116).

Moreover, the monitoring and inspection procedures required by § 114 are certainly as much "administrative regulations" as permit requirements. Congress found it acceptable for state officials to be delegated the authority to require all federal sources other than new ones to be subject to federally-approved state regulations regarding emission records, installation of monitoring equipment and entry for inspection. Thus Congress certainly intended for states to monitor and inspect federal facilities, yet respondents argue that those facilities are exempt from state permit procedures. The fallacy of this argument is self-evident and it should be rejected. As the court in *Alabama* v. *Seeber, supra,* stated, "the substantive-procedural overlay" adopted by the court below in an effort to distinguish between emission standards and permit programs "draws no sustenance from the Act itself" and is merely "a semantical red herring." 502 F.2d at 1245.

POINT II

Compliance by federal instrumentalities causing air pollution with air pollution control laws enacted and approved pursuant to federal law does not violate the supremacy clause.

The court below held that "[i]n the absence of a clear congressional purpose to subject federal agencies to state regulation, the district court was prevented by the Supremacy Clause from granting the injunctive relief sought by the plaintiff" (App. 165). This holding was based upon a misunderstanding of the workings of the Act and of the Congressional intent.

There can be no violation of the Supremacy Clause where, as here, Congress explicitly authorized state regulation of federal installations under a federal act. The scheme of the Act is that ambient air quality standards are set by the federal government but stationary source regulation, including the permit program and emissions limitations, is delegated to the states. This is permissible under our federal system and is a method followed in many areas of law enforcement. For example, the Social Security Act of 1935, 42 U.S.C. § 501-503, which established a federal program of unemployment insurance administered by the states, was held constitutional in *Steward Machine Co.* v. *Davis,* 301 U.S. 548, against an attack on the grounds that the Act violated the federal-state relationship as defined in the Tenth Amendment. And as Mr. Justice FRANKFURTER said in *New York* v. *O'Neill,* 359 U.S. 1, 11, involving reciprocal state agreements to extradite witnesses for criminal proceedings:

> "The manifold arrangements by which the Federal and State Governments collaborate constitute an extensive network of cooperative governmental activities not formulated in the Constitution but not offensive to any of its provisions or prohibitions."

As this Court has noted, "[W]here the Government has provided for collaboration the courts should not find conflict." *Union Brokerage Co* v. *Jensen*, 322 U.S. 202, 209.

In *Mayo* v. *United States*, 319 U.S. 441, 446, this Court held that "[i]t lies within congressional power to authorize regulation, including taxation, by the state of federal instrumentalities." Under the Clean Air Act the states act in effect as agents of the federal government and are explicitly awarded the authority to regulate federal facilities. Section 118 provides that federal agencies must comply with state "requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." This provision fully satisfies the test, enunciated in the *Mayo* case, *supra*, 319 U.S. at 448, that Congress must "affirmatively declare" federal instrumentalities or property subject to state regulations. *Alabama* v. *Seeber*, *supra*, 502 F.2d at 1247-1248.

Likewise, § 114, as we have shown, authorizes the Administrator to delegate to the states authority to monitor and inspect all but new federal facilities. And § 304 makes federal sources subject to citizen suits for violation of "an emission standard or limitation" or "an order issued by the Administrator or State with respect to such a standard or limitation * * *." It is odd that defendants insist in the face of these repeated instances of Congressional delegation to the states that the Supremacy Clause bars state action here. And it would have been anomalous for the authors of the Act to have given the states such powerful authority over air pollution within their borders and then denied them authority over federal sources within those same states' borders.

Further, the refusal of TVA, Army and Atomic Energy Commission to comply with Kentucky's permit program is a federal offense. The Act commands the states to devise plans to implement the national ambient air quality stand-

ards set by the Administrator. The Administrator must then approve each plan and promulgate his approval as a regulation (40 C.F.R. § 52.02). The effect of his action in approving a state plan is to make it federal law as well. This eliminates any issue under the Supremacy Clause. A state official in regulating a federal facility is merely acting in his capacity as a federal agent, pursuant to federal law. This point is clearly shown by the Administrator's power to disapprove state implementation plans and his subsequent promulgation of replacement provisions. In such cases state officials in enforcing an implementation plan will be acting solely pursuant to federal law. (See 40 C.F.R. § 52.1076 and § 52.1077 where the Administrator promulgated replacement provisions for new source review and source surveillance for the State of Maryland).

Section 113(a)(1) (42 U.S.C. § 1857c-8[a][1]) also demonstrates that state plans have the status of federal law. It provides:

> "Whenever * * * the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, * * * the Administrator may issue an order requiring such person to comply with the requirements of the plan or he may bring a civil action * * *."

This empowers the Administrator to enforce by order or civil suit any part of an applicable state implementation plan. If the plans were only state law and not federal law, the Administrator would have no authority to enforce them. See *Getty Oil* v. *Ruckelshaus*, 342 F. Supp. 1006, 1017 (D.C. Del. 1972), mod. on other gds. 467 F. 2d 349, cert. denied 409 U.S. 1125:

> "In the terminology of the statute and regulations, Delaware Regulation XV is a part of the compliance schedule incorporated in Delaware's Implementation Plan. It received federal approval and violation

thereof is a federal crime enforceable by the Administrator."

Moreover, the statute provides (§ 304) that if a citizen sues to enforce a provision of a state plan, that action is considered one involving a federal question and is to be brought in a federal district court.

Thus, when the defendants refused to comply with Kentucky's permit regulation, they were in violation of federal law, and the Supremacy Clause did not absolve them from compliance.

POINT III

The doctrine of sovereign immunity does not bar suit by a State to require a federal facility which is a source of air pollutants to comply with State permit requirements.

A. Congress has consented to suit in § 118 of the Clean Air Act.

It is fundamental that Congress through legislation may consent to suit against federal instrumentalities in all or some cases, *Feres* v. *United States,* 340 U.S. 135, 140. Section 118 of the Clean Air Act constitutes such consent.

The threshold question here is whether Congress acted in such a manner as to unequivocally consent to be sued for violations of state permit regulations. *United States* v. *King,* 395 U.S. 1. Section 118 declares that all federal agencies "shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." As any person may be required by legal action to comply with state permit requirements, § 118 declares that federal agencies shall likewise be subject to state permit requirements and enforcement proceedings. *Alabama* v. *Seeber, supra,* 502 F.2d at 1244; *City of*

Milwaukee v. *Veterans Administration Center,* 357 F. Supp. 192, 193 (E.D. Wis. 1973). This is not surprising in light of the scheme of the Act, making state permit procedures federal law and state officials in effect federal agents in carrying out the Act. *Getty Oil* v. *Ruckelshaus, supra.*

The court below mistakenly pointed to § 304 as the only consent by the federal government to be sued (App. 164):

> "Section 118 contains no waiver [of sovereign immunity] and that included in section 304 does not permit suit to require owners and operators of federal facilities to obtain permits from a state agency in order to continue to operate. The two sections are part of the same Act and must be read together. By failing to include a separate waiver of immunity in section 118 Congress indicates that compliance with its provisions may be compelled only to the extent permitted by section 304."

Section 304 of the Act (42 U.S.C. § 1857h-2), provides for citizen suits to enforce (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such standard or limitation (§ 304[a][1]). Federal facilities as well as state and private facilities are subject to such suit. This section meshes perfectly with § 118, as the Senate Report 91-1196, points out:

> "As recognized under section 118 of the bill, Federal facilities generate considerable air pollution. Since federal agencies have been notoriously laggard in abating pollution and in requesting appropriations to develop control measures it is important to provide that citizens can seek, through the courts, to expedite the government performance specifically directed under section 118." at p. 37.

Citizen suits were not intended to be the first line of enforcement, but only to furnish reinforcement if governments refuse to act. Consequently, citizen suits are confined to suits for violations of emissions limitations. The Court said in *Alabama* v. *Seeber, supra,* 502 F.2d at 1248:

> "The 'Citizen Suits' heading of section 304, the fact that section 304(d) provides for awarding attorney fees, and the legislative history of the section demonstrates that the congressional focus in enacting that provision was on suits by private parties."

But state enforcement procedures are not so limited. Violations of implementation plans are violations of state law as well as federal law, *Getty Oil* v. *Ruckelshaus, supra,* 342 F. Supp. 1006, mod. on other gds. 467 F.2d 349, cert. den. 409 U.S. 1125; *In Re Grand Jury Proceedings,* —— F. Supp. —— 7 Envir. Rptr. Cases 1799 (W.D. Pa. 1975). The states are expressly required to be able to enforce all of their air quality regulations, including permit procedures, § 110(a)(2)(f)(i) (42 U.S.C. § 1857c-5[a][2][f][i]). The Act does not contemplate that states will be limited to the use of § 304 as a means for enforcement. As the court pointed out in *Alabama* v. *Seeber, supra,* 502 F.2d at 1248, "Section 304 cannot be properly read as implying anything about the ability of states to sue under § 118."

Finally, it is clear that one purpose of the § 118 was to shift from a program of voluntary to a mandatory program for federal facilities which were sources of air pollution. *Alabama* v. *Seeber, supra,* 502 F.2d at 1245. The burden placed upon federal instrumentalities is slight for compliance with state permit procedures, as discussed above. See *Washington* v. *Udall,* 417 F.2d 1310 (9th Cir. 1969). In any case, the President can exempt a federal facility from state regulations if they are too burdensome, § 118. Although Congress clearly expressed its intent on this issue, the Court below thwarted that intent by making it unenforceable. As pointed out in *California* v. *E.P.A., supra,*

—— F.2d ——, 7 Envir. Rptr. Cases 1667, 1675 (9th Cir. 1975).

> "Where a construction finding a waiver of exclusive federal jurisdiction would support the stated congressional purpose, then it seems to us that a purported waiver should be construed, if not liberally, at least sensibly." See H. Hart and H. Wechsler, The Federal Courts and the Federal System, p. 1351 (2d Ed. 1973).

B. The doctrine of sovereign immunity does not bar suit against a federal agent to compel him to perform a non-discretionary, ministerial duty to obey federal law.

This Court in *Minnesota* v. *Hitchcock,* 185 U.S. 373, 387, long ago stated that the doctrine of sovereign immunity "does not include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law and which they wrongfully neglect or refuse to perform." Since then many other decisions of this Court have held that the doctrine does not apply where a Federal agent or agency has violated non-discretionary duties under a federal statute. See *Dugan* v. *Rank,* 372 U.S. 609; *Malone* v. *Bowdoin,* 369 U.S. 643; *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682.

As we have described above, § 118 imposes a clear duty upon federal agencies to comply with state "requirement respecting control and abatement of air pollution," including permit requirements. Just as a private owner of emissions sources, federal sources have no discretion as to whether they must seek a permit if the Implementation Plan so mandates, and the federal judiciary has ample power to so direct.

The court below declared that the waiver of immunity in § 304 to sue the Administrator is not applicable since

(App. 168) the court had

> "no power to review the decision of EPA not to commence actions under section 113 since this was a decision on 'agency action committed to agency discretion by law.' "

But this argument misses the point. The nub of this action is to enforce the permit procedures against the TVA and other Federal sources themselves, not to mandamus the EPA. Section 118 gives no discretion to officers in control of federal air pollution sources as to whether to comply with state permit procedures. They "to the same extent as any other person" are required to comply with valid state regulations approved under § 110 of the Act, including permit requirements. If they seek to avoid compliance with the implementation plan of the state where they are located, they must seek a variance, not defy it outright.

CONCLUSION

The order appealed from should be reversed and the plaintiff's motion for summary judgment should be granted.

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Respectfully submitted,

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